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THE  
AMERICAN LAW REGISTER.

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THE JUDICIARY.

THE rapid deterioration of public morals since the late rebellion began is one of the very sad offsets to the benefits which are believed by many to have resulted from the events to which it led. All things seem to have concurred, during its brief but exciting history, to demoralize official character, business tone, and even social relations. The most ardent admirer of the political results will not deny that the community has been lamentably depraved. The standard of public and private integrity is many degrees lower than it was. Money has been so abundant, speculation has run so high, reckless wealth, and ruin from fraud and folly, have changed so many positions and unsettled so many lives, that an unnatural stimulus has been given to evil agencies. The law seems to be less potent and omnipresent. Crime and violence run riot. And those whose mission is reform seem to have, day by day, less heart for their work. Years must elapse before the current of vice can be made to set backward, even under the most favorable influences. Shall we have such influences? Is our government equal to the emergency? Is it capable of assuming that new vigor and firmness which are necessary to bring us back even to where we were seven years ago?

The prospect is rather hopeless. This government, to which the pure and earnest citizen is looking for reform, now that it has escaped from its recent danger, is sliding more and more into the

hands of the dangerous classes. Men to whom human life and the laws of property are nothing, manipulate primary meetings and set up candidates for office. Gamblers, lottery men, and liquor dealers are active in political campaigns, and are becoming so formidable in their unions that politicians truckle to them more than ever, and submit to the pledges they exact. Revolutionary organizations have powers which no association for good can acquire. All the elements of evil seem to unite, as if they had a common end and a common interest, and their union is against good morals and against good government.

As the drowning man clings to the plank, so we have looked to the judiciary in all the alarming phases of our history. It has been less contaminated than any other department of our government. By influences for which every good citizen should be thankful, though he cannot understand them, the bench has been in a large measure preserved from the fate of other departments. With some exceptions it still remains the balance-wheel of the system, our safety among the corruptions which have invaded other branches of the government.

The object we have in view in these pages is to endeavor to show briefly the peculiar causes which have so far tended to save the judiciary, and continue it in comparative purity, and the ruin which must follow if, in choosing our judges, we abandon the instincts which have heretofore guided us, descend to the same sphere in which we battle for candidates for other offices, and permit ourselves to be governed by the same system which governs us in their elections.

The ordinary division of the departments of government into the legislative, the executive, and the judicial, is one so long established and so generally admitted that we receive it implicitly, with but little reflection. According to common conception neither interferes with or invades the other, but, in practice as well as theory, they are distinct.

A very slight experience of the actual workings of the judiciary will show how mistaken this view is. Its powers invade both of the other departments. Though the judge does not make laws or execute them in the abstract or the general, he does so in individual cases. He decides without precedent that A. owes B. money, and sends the sheriff to execute his judgment. He decrees that a child must be taken from a parent,—that a citizen

shall be deprived of his liberty,—that some street may invade my grounds. He stops the construction of a public work ; he sets aside an election ; he decides the title to a corporate office ; he strikes dead an Act of Assembly ; and, when called upon for his reason, he says: “I have found no precedent or analogous case, and I must, therefore, declare that to have been always the law, which in my opinion ought now to be the law.” How a bad man would use such a license, it is unnecessary to explain.

The doctrine that there is existing law for every possible state of facts, that every judge is able to find this law, and that in announcing it he only declares or applies it, as distinguished from making it, is a very beautiful theory, and falls in harmoniously with the established views of government to which we have just referred. But in practice and in substance it is wholly illusory. It may restrain a good judge, and coerce him to explore more conscientiously the sources of customary law, in the hope that there are precedents or analogies to guide him. He may hunt, with the patience of an enthusiast, for the smallest rivulets from the fountain of justice, but he may never find them, and when he does, his very excellence of character may lead him to doubt them. It is only when the waters flow in a steady and certain current that he feels constrained to be carried along against his judgment and his sense of right. Instructed that he is not to make, but only to find the law, he may, with his books around him, be put to a somewhat different kind of mental process, and reach a different result from that which he would reach if he were freed from the control of such a principle. But, in the end, it amounts to the same thing ; what the judge would have decided if he had been a despot, he decides, believing that he has subordinated his judgment to the received theory of his government.

This result arises, most frequently, when questions connected with the organization and construction of public bodies, titles to office, the regularity of elections, the constitutionality of statutes, and other matters having relation to local governments, or of a public or *quasi* public character are presented. The law on these subjects is less settled, and the judge is left without precedent or analogy more frequently than when he is considering such a point, as one arising between landlord and tenant, or the parties to a note. And this is the very field in which political biasses are most exer-

cised, and passions and antagonisms have most influence. It has been a very melancholy experience to the quiet and unexcited watchers of events, to find, in how many cases, judges, whose decisions in matters of every-day business, are those of justice, with bandaged eyes, and even scales, when questions of public concern arose, have decided, again and again, sometimes with temper, each judge taking the side of the party which elected him.

This judiciary, therefore, on which we have relied, is not, in its best state, beyond danger. It is capable of gross misuse, even under the cloak of subordination and submission to principle. Honestly and conscientiously administered, it is conservative in its influence, an asylum for the oppressed citizen, a refuge to which the injured and alarmed may fly with confidence. It may be laughed at for its old-fashioned adherence to the books, for its ties to feudal absurdities, for its weakness for precedents, for its want of a progressive and venturesome spirit; but it has the confidence of every citizen. Angry passions submit to its judgments, and fear and despair never enter within its doors. In all the jangling and discord of weak and ill-contrived machinery of government, this is the balance-wheel which adjusts and harmonizes what, but for it, would be wholly unmanageable.

Put this power into unprincipled hands, and what shall we have? The balance-wheel will become a contrivance for accelerating the ruin of the system. At first under a cloak of submission to legal theory, then without any cloak at all, private revenge, personal outrage, corrupt contrivances, will have full sway. The bench will be the tool of a party; but even this, bad as it can be, will not be the worst. Party ties are strong, but the lure of gain is stronger. To the unprincipled politician no sympathy or affinity avails against the hunger for corrupt acquisition. Those who fight and wrangle at the polls with a fierceness which seems as if it never could admit of reconciliation, are natural conspirators to cheat and defraud. Legislative rings are most formidable when they are combinations of both parties. The unscrupulous judge will become the bully of dangerous organizations, the tool in power, ever ready and reckless with process to suit the emergency. The warrant and attachment will become as formidable to our liberties as they could be in the hands of the veriest tyrant; and property and morality will have to fly, or come in with violence, and right the state by revolution.

Though, while one state has been following another in making the judiciary elective, the change has been the cause of a most serious anxiety to impartial and reflective minds; though it is a system necessarily fraught with danger, and sooner or later the results just pictured must, perhaps, happen, it is a very interesting subject for reflection by what causes these results have been so fortunately postponed. Certain it is that the downward tendency of this department has by no means kept pace with that of the others. While legislatures have become, as a rule, corrupt, the bench has been measurably decent and respectable. The stream of justice has run with comparative purity. Reports of new cases may, perhaps, not be of such ripe authority as those of the old; political questions may have disturbed judicial harmony; patronage may have demoralized official tone and influence, and what the English attorneys style "hugging the judges" may not have been sufficiently discouraged; nepotism may have passed the limits of good taste and judgment; prejudices, tempers, weaknesses, or eccentricities may have been permitted to appear so decidedly that the lawyer has been tempted to adroitness in picking his judge for his case; but in the main we have been fortunate. The evils of the elective system have certainly never yet equalled our fears.

What are the causes of this peculiar safety of the judiciary? Does the elevation of the lawyer to this high and prominent position lift him above human infirmities and temptations? Does he acquire a nature different from that which he had in the busy walks of his profession? Certainly not. He has, perhaps, obtained the place by that personal exertion which is now the rule with all candidates for office. He may have had his gloves off, and his feet in the mire, and been down with the lowest of the low, where election frauds are plotted, and the roughs are hired to carry them through. He is affected by all the after-births of such work. He feels the bondage of a debt to the vile, and dreads the worse than curses which reward the ungrateful politician. He knows the power of the dangerous classes who come before him,—the fierceness of their unscrupulous antagonism,—how long their vengeance waits,—how every session of his court may be pregnant with effect upon that day when he is to ask for a re-election. If he has strength to resist, it is not from want of

perception, it is not from force of character, it is not from indifference to results.

From whatever cause it may arise, there is a popular reverence for the bench, which pervades all classes, and will survive much political degradation. The practice of the law is an "art and mystery," and those who are engaged in it, get the benefit of a respect for the machinery they use, if not for themselves. An absurd result of this very respect is the taunt so often flung in our faces that the lawyer is in league with the devil. It is the layman's bitter admission of his own ignorance and inferiority. With that communion with the wisdom of ages which those well-known books afford; with that power to put in motion process which cannot be resisted; with the unknown significance of those motions granted or denied, on which such important results seem to turn; with that singular cordiality between brethren at the bar, who in the next moment are battling *à l'outrance*; with that immediate deference to decision which in other places would lead to suspicion of indifference or treachery; with a thousand things that he sees and hears, the client has none of the ordinary relations of intelligence. A lawsuit is a game in which he is deeply interested, but which he does not understand. No wonder that he has a respect, much of which is fear, for such a system; and at the head of that system is the judge, lifted above all others, protecting the dignity of his calling, moderating excitements, strong behind his power of punishment, with the last word in every matter, and that word final for the time.

The reverence of years thus acquired is not so easily overthrown. It is endangered by our habits and manners; its gloss has been tarnished by our elective system; by that familiarity between candidate and constituent, which only the politician understands; by the very asking for office, and using the common means of getting it; but it still exists in the mind of the citizen. A singularly strong proof of this is presented by the fact, that, in the midst of the most violent contests, when all around him party lines are drawn with the utmost strictness, and proscription is inflexible, an honest judge is often re-elected by acclamation. It is the living up to this appreciation of the community that tends to support the judge, and give him power to resist evil influences. In the mere calculation of majorities, if he chooses to descend to that,—the balancing of political hazards in view of the time when

he is next to come before the people, he cannot be ignorant that, though in candidates for other offices, vice and even crime are often recommendations, to him the greatest danger of all is to throw himself out of the region of decency.

But he has other aids in his struggles against temptation, or rather his office has other protections against disgrace. The training of the bar is a strong conservative influence. It is less so than it was under the more thorough and laborious course which was prescribed in that country from which we took our common law; but even here, superficial as it is, it has strong power to shape and mould the character. From the time when he first opened the pages of Blackstone, at the commencement of his clerkship, to the time when this step of his ambition is reached, his mind has been filled with dreams of rivalling men who rose by honorable exertion; heroes of the bar of incorruptible lives; men lifted mainly by their own brethren; men who passed through all professional ordeals, first in integrity as well as power, and who came to the bench ripe in everything that could win esteem. Maxims of high tone, legends of professional pride and dignity, stories of battles for professional right, and manly struggles for professional pre-eminence, hours with associates of the same dreams and the same aims, a legal atmosphere, legal instincts, these work together in the lawyer's training. If what is received falls upon proper ground, if it grows with wholesome growth, it is easy to see how it may lift the learner to a new standard, and imbue him with principles from which he cannot break away. The well-trained lawyer receives a moral momentum in a course from which he cannot be turned without violence to a thousand ties and associations.

To one who has been rewarded by its best honors, lifted to its highest place, the scorn of the bar must be intolerable. Its members were once more united than they are now. By want of association they have lost power and influence. But as it is, no one who has ever been of it can stand up against its contempt. The desire to retain its esteem is no mean support to the judge. The most of its members are brave and manly, far above mean sycophancy to the dispenser of patronage, and though patient and forbearing, slow to action and willing to forgive, they are ready and able, when the crisis comes, to speak with an emphasis which cannot be treated lightly. If an erring judge is capable of disregarding



such a rebuke ; if neither the training to which he has submitted, the pride of his science, or the respect of his brethren, can influence him for good, he is vile indeed ; a fitting tool for the enemies of all law and decency.

To secure the safety of the judiciary, therefore, the candidate for the bench must be imbued with the learning of the bar, with its spirit of fraternity and subordination, with its legends and instincts, its confidence in its own organization, the desire which each member has for the respect of all the rest ; and such a candidate is to be found only among those who lead in learning and integrity.

Heretofore the judges have, by a sort of common consent, been chosen from among practising lawyers. It might have been otherwise, however. Even in those localities in which it is required that candidates for the bench shall be taken from the bar, it would be easy for designing politicians to evade the rule. Our communities are full of men who have been admitted to practice, but who have been driven from it, or drawn away by other pursuits, and have lost all professional tone and all professional acquirement. From among these, candidates might be sought by those who desire a corrupt and subservient judiciary, and we should lose all those grounds of reliance which have just been enumerated.

But from a singular deference to the common sense of the community it has been generally conceded, if not by expression, by action, that this office is to be treated differently from others. In the midst of the most exciting political struggles, in which, for all other purposes, the lowest agencies have been at work, the bench has been rescued from contamination by being left in the hands, mainly, of the bar. The politician has drawn off, in a measure, from this field, and surrendered it to the profession most directly concerned and interested ; and it is to the credit of that profession that in exercising this duty, it has been lifted in the main, far above the considerations that involve themselves with all other portions of the political struggle.

However we may turn, then, with disgust from other fields of political contest, let us not surrender our rights here. Our interest and our duty unite to require vigilance in these elections. With the bench as degraded as the legislature, what are the privileges and honors of the bar worth ? When the day shall come in which

the client in selecting his lawyer shall do so because he is the son of a judge, or helped a judge into office, or is his friend, favorite, or tool; when learning shall be as nothing before unscrupulous influence; when the highest skill shall be shown in picking the judge for the case, and moulding him by adroit manipulation; when learning shall go down before trick and cunning, and honor and integrity shall be at a discount; when the judge shall drink with the politician, and spend his nights with the gambler and debauchee; when libraries shall become useless, and our three years' training a waste of time; when roughs shall take out licenses to practise, and jostle and threaten us with impunity in the very halls of justice, who that has any pride or decency will practise himself or rear his child to the bar? All these things may be near if we shrink from the struggle, or forget, among the cares and emoluments of practice, the dangers to which we are exposed.

But there is another motive which should operate with each one of us. For ages this profession of ours has been sacredly guarded and preserved. Through all perils it has been borne along bravely, firmly, successfully. High maxims have sustained its character and its privileges. Instances of dishonor have been so few as to serve only as a wholesome contrast. Shall we neglect the trust committed to us? Shall we, from fear or despair, falter in a duty so manifest? Shall we hand the profession down to our children disgraced and degraded?

To avoid such a result we should be more united. Some stronger bond should bind us to one another for purposes of influence and protection. An association of lawyers, properly organized, would be a power in the community of no mean importance, and always a power for good. No apostle of reform, no lover of his profession, no one who is anxious for his country's honor and permanence, can have a better mission than this, to unite the bar, and give it its deserved weight in the community.